97-962

No.

Supreme Court, U.S.
FILED
FEB 2 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SOLID WASTE TRANSFER & RECYCLING, INC.,
Petitioner,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION; THE COUNTY OF ESSEX, NEW JERSEY; THE CITY OF NEWARK, NEW JERSEY; THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF RATEPAYER ADVOCATE and WASTE MANAGEMENT OF NEW JERSEY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

CHARLES M. FORMAN
Counsel of Record
JOSEPH M. CERRA
FORMAN HOLT & ELIADES LLC
Attorneys for Petitioner
One Mack Centre Drive
P.O. Box 727
Paramus, New Jersey 07653

QUINN MARTIN
Of Counsel to Petitioner

13 pp

TABLE OF CONTENTS

		Page
PETITIONER'S REPLY BRIEF		1
I	THE REGULATION OF SWTR IS UNCONSTITUTIONAL	3
	A. *SWTR's Deficit Is Legitimate*	4
	B. *SWTR'S Rent Was Competitive*	5
	C. *SWTR's Expenses Are Reasonable*	6
II	THE STATE'S SEVERANCE OF THE CPI CLAUSE IS UNCONSTITUTIONAL	7
III	THE STATE'S SELECTIVE REGULATION OF SWTR IS UNCONSTITUTIONAL	8
CONCLUSION		10

TABLE OF AUTHORITIES

Cases:	Page
Bluefield Water Works & Improvement Co. v. Public Service Commissioner of West Virginia, 262 U.S. 679 (1923)	8
Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989)	4, 7
Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956)	8
In re Application of Saddle River, 71 N.J. 14 (1976)	8
In the Matter of the Application of SES Gloucester, BPU Docket No. SE85100984 (BPU, October 21, 1987)	9
In the Matter of the Application of the Passaic County Utilities Authority, BPU Docket No. S08704360 (October 26, 1987)	9
In the Matter of the Petition of the Union County Utilities Authority, DEP Docket No. CT05593003 (DEP, January 14, 1994)	9
Lindsey v. Normet, 405 U.S. 56 (1972)	8
State Farm Mutual Automobile Ins. Co. v. State of New Jersey, 124 N.J. 32, 590 A.2d 191 (1991)	3

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SOLID WASTE TRANSFER & RECYCLING, INC.,

Petitioner,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION; THE COUNTY OF ESSEX, NEW JERSEY; THE CITY OF NEWARK, NEW JERSEY; THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF RATEPAYER ADVOCATE and WASTE MANAGEMENT OF NEW JERSEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITIONER'S REPLY BRIEF

Petitioner Solid Waste Transfer & Recycling, Inc. ("Petitioner" or "SWTR") submits this brief in reply to the briefs filed by respondents New Jersey Department of Environmental Protection ("DEP"), the County of Essex ("Essex" or the "County"), and the City of Newark ("Newark") (collectively "Respondents") in opposition to SWTR's Petition for Certiorari. In their briefs, the Respondents stray time and again from facts in a futile effort to conceal the constitutional violations of SWTR's rights.

In its petition, SWTR warned that "[w]hen push comes to shove, the respondents will be unable to cite to this Court even one other case where the state excised an inflation-linked adjuster from a utility contract under its jurisdiction." (Petition, p. 16). As promised, the Respondents arrive at this Court empty handed. Despite their protestations that forfeiture of SWTR's inflation-linked adjuster represents nothing more than enforcement of well-established policy, the Respondents cite no other case where this asserted "well-established" policy was enforced against a contract utility.[1] This omission results not from their neglect: there simply are no such cases, and there simply is no such policy. (*See* 163a; 188a-189a).

Having no real policy upon which to rely, the Respondents resort to confusion. They accuse SWTR of not carrying its burden of proof, even though the Administrative Law Judge (the "ALJ") concluded that SWTR proved its case by the "overwhelming weight" of the evidence. (147a). Despite Essex's efforts to argue that SWTR's operating deficit resulted from its excessive debt-to-equity ratio rather than from legitimate operations -- a position that no accountant would even sanction under oath at the hearings -- the following facts are unassailable: (1) SWTR experienced a legitimate operating deficit caused by its payment of approved operating expenses; (2) SWTR's deficit was caused by its payment of approved expenses; and (3) the contract rates, if enforced, would have resulted in a seven percent annual return on SWTR's total investment in the project. Respondents cannot be permitted to create factual "issues," without citation to any support in the record, so as to frustrate review in this Court.

Second, the Respondents repeatedly assert that SWTR did not produce a regulatory cost-of-service case. SWTR's costs proofs were comprehensive. Based on her exhaustive review of facts, the ALJ concluded that SWTR proved its entitlement to enforce its contract rates not just through its competitive

---

[1] The Respondents can only resort to citing cases involving inapposite tariff utilities that perform services without a contract. (*See* Point III).

market proofs, but through its operating ratio cost-of-service case and its comparative rates analysis. (192a; *see* 181a). SWTR's operating ratio case was supported by the expert testimonies of Dr. Joseph Mauriello, who testified in detail as to SWTR's expenses[2], and of the preeminent economist Dr. James L. Bicksler, full professor at the Rutgers University Graduate School of Management. Dr. Bicksler "testified regarding his analysis of an appropriate rate of return under varying regulatory methodologies" (191a). The ALJ concluded that Dr. Bicksler's operating ratio analysis was persuasive and corroborative, from a cost-of-service perspective, of the reasonableness of SWTR's rates. (181a).

I

THE REGULATION OF SWTR IS UNCONSTITUTIONAL

Respondents acknowledge that SWTR was constitutionally entitled to a "rate sufficient to assure its financial health." *State Farm Mutual Automobile Ins. Co. v. State of New Jersey*, 124 N.J. 32, 48, 590 A.2d 191 (1991) (*See* Eb11), but they skirt the significance of this precept in their discussions. The issue before this Court is whether the state, consistent with the Fifth and Fourteenth Amendment of the United States Constitution, may fix a rate for utility services that is insufficient for the utility to pay even its necessary and approved operating expenses.

The Respondents avoid this issue altogether by arguing that the regulators concluded that SWTR's rates, as adjusted in accordance with Consumer Price Index ("CPI") clause of the contract, were excessive. No such finding was ever reached at any level of review in this matter.

---

[2] The DEP counsel's complaint that, with respect to SWTR's expenses, its staff was forced to rely on unaudited financial statements that "comingled" transportation and disposal costs is remarkable. Dr. Mauriello presented live, sworn testimony in which he detailed each and every of SWTR's expenses.

The DEP and the Board of Public Utilities ("BPU") (collectively the "regulators") declined to enforce SWTR's CPI-adjusted rates not because they were excessive -- in fact they still would have been the lowest in the state for comprehensive transfer services -- but because SWTR allegedly did not show a "nexus" between the cost components affecting the CPI and the cost components of SWTR's operations. (35a). The regulators, asserting that their "policy" required such a showing before a utility could enforce an inflation-linked adjuster, struck the CPI clauses and created a deficit situation. SWTR contends that since the constitution prohibits the state from fixing a confiscatory rate, *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989), and a rate insufficient to pay even approved expenses is demonstrably confiscatory, that the regulators' decision cannot survive constitutional scrutiny.

A. *SWTR's Deficit Is Legitimate*

It was, is, and will always be undisputed that SWTR experienced a legitimate operating deficit. SWTR's witness, Dr. Joseph Mauriello, testified to this fact at the hearings, and his testimony was undisputed. While neither the DEP nor Newark challenge SWTR's operating deficit, Essex now argues in its brief that SWTR's deficit was illusory.

No accountant would offer as expert sworn testimony the amateur accounting that Essex urges to this Court. Because Dr. Mauriello's testimony that SWTR faced a legitimate operating deficit of $2,722,569 opinion was unassailable, the parties could not dispute his opinion with contrary opinion. The ALJ wrote that Dr. Mauriello's "background in finance and economics is extensive, and he was an extremely credible and persuasive witness." (191a).

The county's counsel now tries to wear the hat of its absent expert accountant in arguing that SWTR, through creative accounting, was able to "show" a deficit through an excessive debt-to-equity ratio. (Eb11). Essex argues that since "shareholder 'notes' were payable at rates of up to 16%," (Eb11) SWTR's deficit was no surprise -- an insupportable

premise that Essex could not even dignify with a single citation to the record. The first flaw in the County's accounting analysis is that it was undisputed that SWTR did and could not repay debt owed to its shareholders in accordance with note terms. (208a). SWTR's deficit thus was not caused paid by interest payments on principal.

Second, even if SWTR had been repaying consistent with note terms, Essex misleads when it writes that the notes were to be "payable at rates of up to 16%." Two notes, for a short duration prior to April 1, 1988, were intended to be paid at 16 percent interest. (114a). This Court cannot permit Essex to get way with advocating that repayment of notes "payable at rates of up to 16%" caused SWTR to "show" a deficit. Essex must point to some evidence supporting its argument. Vague and misleading accusations do not do duty for facts of record; they certainly cannot undermine undisputed expert opinion offered by a persuasive and credible witness.

When SWTR writes that, if the CPI clauses were enforced, it would have shown a profit of $704,924[3] during the relevant period, that profit is calculated on SWTR's total investment of $3.5 million, regardless of whether the money was initially invested as equity or debt.

B. *SWTR'S Rent Was Competitive*

Nor is the County's effort to pin the blame for SWTR's deficit on its rental expense legitimate. (Eb11-12). The ALJ and the regulators accepted SWTR's rental expense of $900,000 per year as reasonable. (55a). This Court should decline Essex's invitation to revisit these factual findings of the regulators.

The regulators concluded SWTR's negotiations with its landlord were at arm's length and competitive, resulting in a reasonable rent obligation. At the hearings, Newark produced

---

[3] Respondents mislead with the suggestion that SWTR sought adjustments in excess of the CPI. (*See* Petition, p.14, n.5).

a real estate appraiser who estimated that the rental value of the property was $129,000 per year. The ALJ was quick to dismiss this testimony as uninformed. (187a).

SWTR produced its own expert real estate appraiser, Richard Marashlian, whom the ALJ concluded was far better informed as to the facts concerning the transaction. (187a-188a). Mr. Marashlian determined, *before* consideration of the enhanced business value that the site's ideal location created for a transfer station operation, that SWTR's fair market rental would be $657,000. He testified that because the transfer station site met stringent environmental siting requirements, it possessed an enhanced business value for a transfer station operation. Citing a lack of market data, Mr. Marashlian refused to speculate to what extent the site's ideal location enhanced the fair market rental for SWTR. Only one other transfer station in New Jersey, the Morris County transfer station, rented its facility. It paid $955,000 per year. (Hearing Exhibit WMNJ-10A). While the data regarding enhanced business value may have been inconclusive, the regulators must have been impressed that SWTR paid considerably less than its Morris County counterpart. (55a). When Essex writes that SWTR entered into a "lease with a company owned by one of its principals" (Eb11), it neglects that Harold Martin, a principal of the landlord, purchased an equity stake in SWTR *after* SWTR had executed its lease. (182a). Essex's insinuation of some cozy relationship between SWTR and its landlord, Glopak Corporation, is belied by the record. Throughout the proceedings below, Glopak and SWTR, and their principals, were engaged in extensive litigation against one another. (182a).

C. *SWTR's Expenses Are Reasonable*

SWTR established in its Petition that its deficit resulted from the payment of operating expenses approved by the regulators. DEP's counsel now argues that the regulators' acceptance of SWTR's expenses was "generous." (DEPb14). The DEP's response is more telling than it might care to admit.

This Court should expect that DEP's counsel would argue, with august conviction, that factual findings of its clients are unassailable. Yet the DEP now soft pedals its own factual determinations. This can only be perceived as the DEP's implicit recent recognition of the constitutional infirmity of its decision. The DEP has no valid response as to how SWTR could legally be driven into deficit for paying expenses it approved. So it asserts that it was "generous" with SWTR, "in view of the limited nature of the data available from SWTR." (DEPb14). In truth, SWTR's proofs as to its expenses were comprehensive. (*See* 118a-131a.)

As DEP's counsel should argue to this Court, the findings of its clients upholding SWTR's expenses are completely supported in the record. SWTR was driven into deficit simply from paying these approved expenses, and respectfully requests that this Court review the constitutional implications of these undisputed circumstances.

II

THE STATE'S SEVERANCE OF THE CPI CLAUSE IS UNCONSTITUTIONAL

The Respondents argue that the state enjoys the sovereignty to modify any contract under its jurisdiction. They therefore contend that any exercise of the state's right to modify a contract is constitutionally permissible. Unfortunately for the Respondents, the second premise does not follow from the first.

SWTR does not dispute the state's right to modify utility contracts. It contends, however, that the state's sovereignty to modify the SWTR contract is subject to the constitutional requirement of due process and its prohibition against takings. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989). The DEP's order in this matter expressly states that it can modify a utility contract without regard to constitutional principles:

> "Every contract with respect to utility rates in conclusively deemed to be made with the knowledge and in contemplation of the sovereign power of the

> state to alter it, and hence no objection can be raised that state regulation impairs the obligation of contract or deprives the contracting parties of property without due process of law ..."

(35a, *quoting*, 73B *C.J.S.* "Public Utilities" at 164). SWTR disagrees with this assessment. Where the state alters a utility contract in a manner that deprives the utility of a rate sufficient to protect its financial health, *see Bluefield Water Works & Improvement Co. v. Public Service Commissioner of West Virginia*, 262 U.S. 679, 693 (1923), then the state action is unconstitutional regardless of what policy the state asserts as its justification. *Duquesne Light,* 488 U.S. at 310 ("it is not theory but the impact of the rate order which counts").

III

THE STATE'S SELECTIVE REGULATION OF SWTR IS UNCONSTITUTIONAL

With no way to refute SWTR, the DEP remains honorably silent in response to SWTR's challenge to identify even one other case where its asserted anti-CPI policy was applied to a *contract* under the state's rate-making jurisdiction. Essex and Newark stoop to confusion tactics, citing cases where the regulators denied inflation-linked relief to more traditional *tariff* utilities. (Eb9 and Nb7). The distinction between a tariff utility and a contract utility is well founded: although a contract utility enjoys no right to relief from disadvantageous pricing terms of its contract, *In re Application of Saddle River*, 71 N.J. 14, 25 n. 12 (1976), *citing Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348, 354-55 (1956), a tariff utility may petition the state for rate relief at any time its existing rate structure proves insufficient.

SWTR is cloaked with a right to due process and equal protection of New Jersey's laws and, in the absence of some rational state basis, the state must treat SWTR as it treats other contract utilities under its jurisdiction. *See Lindsey v. Normet*, 405 U.S. 56, 77 (1972). The issue before this Court is

not how the state treats tariff utilities, but how it treats similarly-situated contract utilities.

SWTR cited prior and subsequent examples where contract utilities enforced inflation-linked adjusters without being required to show any nexus between costs components of the index and cost components of their operations. *In the Matter of the Application of SES Gloucester*, BPU Docket No. SE85100984 (BPU, October 21, 1987) ("SES Gloucester") (216a); *In the Matter of the Petition of the Union County Utilities Authority*, DEP Docket No. CT05593003 (DEP, January 14, 1994) ("Petition of UCUA") (214a). SWTR also cited to another case where a solid waste transfer station was entitled to enforce its contract rates, including annual escalators, simply because the contract was negotiated under competitive conditions. *In the Matter of the Application of the Passaic County Utilities Authority*, BPU Docket No. S08704360 (October 26, 1987) (216a) (the "PCUA Order"). But different rules apply to SWTR.

The state seeks to distinguish the PCUA Order and the Petition of UCUA by arguing that, because the contracts in question also involved out-of-state parties, it lacked jurisdiction in those matters. (DEPb10-11). But the state approved the contract in the PCUA Order, and significantly modified the contract in the Petition of UCUA, while leaving that contract's CPI-linked adjuster in place. (214a; 216a).

The Respondents are therefore left to argue that, in the cases cited by SWTR, the inflation-linked escalators were approved because they were tailored to reflect the utility's operating costs, or because in each case, the increases were subject to on-going regulatory review. As for the Respondents' first point, it just is not true. No language in the cited orders provides that the increases were acceptable because they were tailored to reflect the utility's operating costs. As for their second point, no clause in any of the approved contracts in the matters cited by SWTR provided that the contractual increases were subject to the regulators' on-going review after

approval. The regulators imposed their on-going review as a condition of their acceptance. Why not here?

Finally, Essex seeks to distinguish the PCUA Order by comparing the tipping fees in that case "in the $65.00 range" and the "$100+" tipping fees paid to SWTR. (Eb15). The Passaic County tipping fees did not include any disposal costs, taxes, or host community benefits, all of which were included in SWTR's tipping fee. (131a-133a). Mercer County's tipping fee of $92.26 did not include disposal costs (132a). SWTR provided the lowest rates in the state, even when the CPI increases were applied. (131a).

CONCLUSION

Respondents argue that this case is a local matter unworthy of this Court's attention. To the contrary, this matter presents a clear constitutional violation for which this Court should provide a remedy. SWTR believes that its rights are protected, not just in theory, but by a vibrant document. In other lands people may be governed by a constitution grand in theory but not in practice. In this land, constitutional protections are not paper promises. SWTR respectfully requests that its Petition for Certiorari be granted.

Respectfully submitted,

CHARLES M. FORMAN
Counsel of Record
JOSEPH M. CERRA
FORMAN HOLT & ELIADES LLC
Attorneys for Petitioner
One Mack Centre Drive
P.O. Box 727
Paramus, New Jersey 07653

QUINN MARTIN,
Of Counsel to the Petitioner